IN THE

Supreme Court of the United States

NO. 155 OCTOBER TERM, 1960

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States, Appellant, NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (Three Rivers, Michigan), COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States, Intervening Plaintiffs,

v.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, State Commissioner of Revenue, Appellees.

On Appeal from the Supreme Court of the State of Michigan

MOTION OF FOURTEEN NATIONAL BANKS IN PENNSYLVANIA FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF

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MOTION OF FOURTEEN NATIONAL BANKS IN PENNSYLVANIA FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, Mellon National Bank and Trust Company, The Philadelphia National Bank, Pittsburgh National Bank, Central-Penn National Bank of Philadelphia, Western Pennsylvania National Bank, The Union National Bank of Pittsburgh, The First National Bank of Erie, First National Bank and Trust Company of Waynesburg, The Bradford National Bank, The First National Bank of Altoona, North-Eastern Pennsylvania National Bank and Trust Company, Easton National Bank and Trust Company, The National Bank of Boyertown and The Conestoga National Bank of Lancaster ("Pennsylvania Banks") respectfully move for leave to file as amici curiae a brief in the above entitled case and, in support of such Motion, make the following statement:

1. The above entitled case, (the "Michigan Case"), involves the legality under R. S. 5219 (12 U.S.C. 548) of a tax on national bank shares imposed by the State of Michigan for the year 1952.

2. The Pennsylvania Banks are national banks in Pennsylvania and are plaintiffs, on behalf of themselves and all national banks in Pennsylvania, in a suit in equity against Charles M. Dougherty, Secretary of Revenue of Pennsylvania, pending and at issue in the Court of Common Pleas of Dauphin County, Pennsylvania, at Equity No. 2395, No. 25, Commonwealth Docket, 1960 (the "Pennsylvania Case"). In the Pennsylvania Case, the Pennsylvania Banks seek to restrain, as violative of R. S. 5219, the assessment and collection of a tax of 8 mills on the shares of national banks in Pennsylvania (the "Pennsylvania bank shares tax"), as provided by the Penn-

sylvania Act of July 15, 1897, P. L. 292, as most recently amended by Act No. 476 of the 1959 General Assembly of Pennsylvania (Pa. Stat. Ann. Tit. 72, § 1931, (1949) Pkt. Part 1959). The 1959 amendment increased the rate of tax from 4 mills to 8 mills for the years 1959 and 1960.

3. The Complaint in the Pennsylvania Case alleges that the Pennsylvania bank shares tax violates R. S. 5219 as to national banks because it imposes a tax at a greater rate than is assessed upon other moneyed capital coming into competition with the business of national banks. The Complaint in the Pennsylvania Case alleges that moneyed capital in the hands of individual citizens of Pennsylvania is employed in substantial competition with the business of national banks by (i) individuals, partnerships and associations; (ii) state- and federal-chartered savings and loan associations; (iii) state- and federal-chartered credit unions; (iv) small loan, consumer discount and finance companies; and (v) mutual savings banks. The Complaint sets forth that the shares of national banks are taxed at a greater rate than the rate of tax, if any, imposed on the several types of competing moneyed capital enumerated above in violation of R. S. 5219 and of the Constitution of the United States.

4. The Pennsylvania Case involves some issues in common with the Michigan Case and the determination of this Court in the Michigan Case may affect the outcome of the Pennsylvania Case.

5. The Pennsylvania Banks fully support the positions taken by Appellant and Intervening Plaintiffs in the Michigan Case, but the facts with respect to the tax imposed by Michigan on shares of national banks (the "Michigan bank shares tax"), and the taxes imposed by

Michigan on moneyed capital represented by shares of savings and loan associations are different from those involved in the Pennsylvania Case in that no tax is imposed in Pennsylvania on the moneyed capital represented by shares of such associations. Moreover, in the Pennsylvania Case, the Pennsylvania Banks complain that Pennsylvania imposes on the shares of national banks, in violation of R. S. 5219, a tax at a rate greater than that imposed on moneyed capital represented by shares of, or interests in, not only savings and loan associations but also the other types of business entities as set forth in paragraph 3 of this Motion.

6. The Pennsylvania Banks seek by a brief as amici curiae to present to this Court certain statements of positions to the end that the judgment of this Court in the Michigan Case (i) will be based upon positions which, if made applicable to similar issues in the Pennsylvania Case, would not be prejudicial to the Pennsylvania Banks and (ii) will not be based upon positions which might be inferentially dispositive of issues in the Pennsylvania Case which are not before the Court in the Michigan Case.

7. The parties to the Michigan Case have used arguments based on decisions of this Court concerning the legality under R.S. 5219 of taxes on national bank shares as compared with taxes on the same types of competing capital as those involved in the Pennsylvania Case. The weight given by this Court to such arguments and the discussion by this Court of such precedents might have an effect on the Pennsylvania Case.

8. Because of the extent to which the Michigan Case hinges on consideration of the intangibles tax im-

posed on savings and loan shares and on shares of national banks, respectively, the Pennsylvania Banks believe that the following legal arguments will not be adequately presented by the parties:

(a) The decisions of this Court holding "mutual" savings institutions not competitive with national banks (at the particular time and place) do not establish a fixed rule of law that such "mutual" savings institutions are not competitive with national banks. Congress did not intend that court decisions could have the effect of a "freeze date" as of which competition of particular types of entities would be judged. The several decisions sustaining the legality under R.S. 5219, at the time, of state exemptions of capital of such institutions were based on economic and sociological factors believed by the Court to have been justifiably considered by the state at the time. Legally compelling economic and sociological considerations now deprive R.S. 5219 of practical meaning unless these types of competing entities are treated for the purposes of R.S. 5219 as large and powerful aggregations of capital substantially competitive with national banks.

(b) R.S. 5219, while designed to protect national banks from discriminatory taxation, has, and should have, the reciprocal effect of causing states to impose on moneyed capital represented by shares in competing entities a tax commensurate with that imposed on national banks. Artificial rules of law affording "partial exemptions" or holding specific types of competing capital to be legally non-competitive, regardless of the facts, would create reservoirs of untaxed or too lightly taxed capital. This would discriminate not only against national banks. It would also discriminate against the public generally by cutting down sources of revenue for

the states at a time when states are hard put to find sources of revenue.

(c) The parallel legislative development of the powers of national banks and "mutual" savings institutions as parts of our financial and credit structure demonstrates legislative recognition of competition among them and tends to prove a legislative attempt to preserve equality of competitive opportunity among financial institutions.

9. The Appellant has consented in writing to the filing of a brief by the Pennsylvania Banks as amici curiae but the Appellee has refused consent.

10. The brief which the Pennsylvania Banks request permission to file as amici curiae accompanies this motion.

Respectfully submitted,

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STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and Louis M. NIMS, State Commissioner of Revenue, Appellees.

On Appeal from the Supreme Court of the State of Michigan

BRIEF OF FOURTEEN NATIONAL BANKS IN PENNSYLVANIA AS AMICI CURIAE

Mellon National Bank and Trust Company, The Philadelphia National Bank, Pittsburgh National Bank, Central-Penn National Bank of Philadelphia, Western Pennsylvania National Bank, The Union National Bank of Pittsburgh, The First National Bank of Erie, First National Bank and Trust Company of Waynesburg, The Bradford National Bank, The First National Bank of Altoona, North-Eastern Pennsylvania National Bank and Trust Company, Easton National Bank and Trust Company, The National Bank of Boyertown and The Cones-

toga National Bank of Lancaster ("Pennsylvania Banks") file this brief as amici curiae in the above appeal by Michigan National Bank from a judgment of the Supreme Court of Michigan entered on February 25, 1960 affirming a judgment for appellees by the Court of Claims for the State of Michigan sustaining the legality under R.S. 5219 (12 U.S.C. 548) of a Michigan tax on national bank shares imposed for the year 1952.

INTEREST OF THE AMICI CURIAE

The Pennsylvania Banks are national banks in Pennsylvania. They are plaintiffs on behalf of themselves and other national banks in Pennsylvania in a suit pending in the Court of Common Pleas of Dauphin County, Pennsylvania seeking to restrain, as violative of R.S. 5219, the assessment and collection of a tax of 8 mills on the shares of national banks in Pennsylvania under the Pennsylvania Act of July 15, 1897, P. L. 292, as most recently amended by Act No. 476 of the 1959 General Assembly of Pennsylvania (Pa. Stat. Ann. Tit. 72, §1931 (1949) Pkt. Part 1959). The 1959 amendment increased the rate of tax from 4 mills to 8 mills for the years 1959 and 1960.

As set forth in the Motion to file this brief, the Pennsylvania Banks allege in their Complaint that moneyed capital in the hands of individual citizens of Pennsylvania represented, inter alia, by untaxed shares in savings and loan associations is employed in substantial competition with the business of national banks. The Pennsylvania Banks make reference to such Motion for additional details with respect to their interest in the above-entitled case.

ARGUMENT

I.

The Decisions of This Court Holding "Mutual" Savings Institutions Not Competitive With National Banks (at the Particular Time and Place) Do Not Establish a Fixed Rule of Law That Such Institutions Are Not Competitive With National Banks.

The appellees' argument and the opinions of the Court of Claims of Michigan and of the Supreme Court of Michigan say in effect that as a matter of law national banks may not complain, under R.S. 5219, against more favorable tax treatment accorded the shares of savings and loan associations since the latter by their nature are non-competitive with national banks. For example, the appellees' Motion to Dismiss or Affirm (page 22) speaks of:

> "* * * the clear import of these decisions, which is simply that a state's tax on bank shares is not invalidated by §5219 if the state exempts or preferentially taxes for public policy reasons some moneyed capital."

Appellees further assert in their Motion to Dismiss or Affirm (page 29) that the existence of "factual competition" is an "immaterial issue."

The opinion of the Supreme Court of Michigan (Statement as to Jurisdiction, page 68b) says that:

> "* * * Michigan building and loan associations operated in a narrow, restricted field, are markedly different in *character, purpose and organization* from national banks, and are not in 'substantial competition' with national banks." (Emphasis ours).

The same Court, in discussing the opinion of the Court of Claims, said (ibid. page 50b):

> "The court justified its finding of no cause of action by stating its conclusions as follows:
>
> (620) '1. Since 1887, the courts have consistently held in every case squarely involving the question that the State may exempt or prefer on the ground of public policy mutual savings bank and other like institutions, provided such exemption is based on just reason and is not made for the hostile purpose of an unfriendly discrimination with national banks.' "

The Supreme Court of Michigan also said (ibid. page 57b):

> "The approval of the Supreme Court of the United States of partial exemptions of mutual savings banks also applies to savings and loan associations, as shown by the following decisions:
>
> [Citing *Mercantile National Bank of Cleveland v. Hubbard,* 98 Fed. 465, 471 (N.D. Ohio) affirmed *Lander v. Mercantile National Bank,* 186 U.S. 458, 22 S.Ct. 908, 46 L.ed 1247 (1902); *Hoenig v. Huntington National Bank,* 59 F. 2d 479, 482 (C. A. 6 1932), certiorari denied 287 U.S. 648, 53 S.Ct. 93, 77 L.ed. 560 (1932)].

However, the cases cited do not establish a fixed rule of law. The appellant's brief filed in this Court makes it clear that the cases discussed by the Supreme Court of Michigan were decided against a different economic, sociological and factual background. There is no need for us to repeat the arguments of appellant that this Court should decide cases under R.S. 5219 on the basis

of whether or not the facts evidence the existence of substantial competition.

The Congress, in legislating against non-equivalent taxation of national bank shares, did not intend that court decisions should have the effect of a "freeze date" as of which competition of particular types of entities would be judged.

The several decisions sustaining the legality, at the time, under R. S. 5219 of state exemptions of capital of mutual savings banks or savings and loan associations were based on economic and sociological factors believed by the Court to have been justifiably considered by the state, at the time. Legally compelling economic and sociological considerations deprive R.S. 5219 of practical meaning unless these types of competing entities are treated for the purposes of R.S. 5219 as large and powerful aggregations of capital substantially competitive with national banks. In respect of savings and loan associations, this conclusion is strongly supported by the impressive showing in appellant's brief of the growth and financial strength of such institutions.

While a state may establish some exemptions for "just reasons," the privilege of maintaining the exemptions—as against the application of R.S. 5219—must surely depend on the continued validity of the reasons. Taxation is the rule and exemption is the exception.

In the cases cited by the Court below which sustain —against attack under R S. 5219—preferential taxation or non-taxation of mutual savings institutions, the Court uses again and again the phrase "provided such exemption is based on just reason," e.g. *Mercantile National*

Bank v. New York, 121 U.S. 138, 7 S.Ct. 826, 30 L.ed. 895 (1886); *First National Bank v. Chehalis County,* 166 U.S., 440, 17 S.Ct. 629, 41 L.ed. 1069 (1897).

The "just reason" in a case under R.S. 5219 must surely be one that makes sense at the time.

This Court's recognition of the legitimacy of the exemption in the old cases is explained in *Mercantile National Bank v. New York,* 121 U.S. 138, 7 S.Ct. 826, 30 L.ed. 895 (1886); *Davenport National Bank v. Davenport Board of Equalization,* 123 U.S. 83, 8 S.Ct. 73, 31 L.ed. 94 (1887); *National Bank of Redemption v. Boston,* 125 U.S. 60, 8 S.Ct. 772, 31 L.ed. 689 (1887); *First National Bank v. Chehalis County,* 166 U.S. 440, 460, 461, 17 S.Ct. 629, 41 L.ed. 1069 (1897); *First National Bank v. Chapman,* 173 U.S. 205, 214, 19 S.Ct. 407, 43 L.ed. 669 (1899); *Mercantile National Bank v. Hubbard,* 98 F. 465, 471 (N.D. Ohio 1899).

Basically the reasons were to nurture institutions for the accumulation of small savings belonging to the thrifty, to nurture institutions under public (as distinguished from stockholder) management which handled savings of small depositors, to encourage associations which financed the building of small houses by poor people and the saving from their earnings week by week of an amount sufficient to pay the mortgage debt incurred in the purchase of the land and the construction of the house.

The appellant's brief filed in this Court points out the factual competition which exists between savings and loan associations and national banks. It points out the growth of savings and loan associations to a position of dominance in the residential mortgage business and

to a position of competing strongly for savings. It points out that, under the standards of *First National Bank v. Hartford*, 273 U.S. 548, 47 S.Ct. 462, 71 L.ed. 767 (1927), this Court should find the existence of competition on the basis of these overpowering facts.

We add to that argument the thought that, since this Court found itself impelled by sociological and economic considerations, valid at the time, to accord validity—for the purposes of R.S. 5219—to state exemptions or "partial exemptions" ("excusable discrimination" would have been a better phrase), it should for sound economic reasons now hold that the economic and sociological basis for the discrimination no longer exists.

We believe that this Court has already taken this step. *Hartford* would seem to prove it. An examination of the opinion of the state court in *Hartford* shows that one of the types of competing moneyed capital was building and loan shares. (187 Wis. 290, 203 N.W. 721 (1925)). In the case of *Commercial Nat'l Bank v. Custer County*, 76 Mont. 45, 245 Pac. 259 (1926), *rev'd per curiam* 275 U.S. 502, 72 L.ed. 395 (1927), a Montana tax which discriminated against national banks vis-a-vis, inter alia, savings and loan associations, was invalidated by this Court which reversed a state court on the authority of *Hartford* and *State of Minnesota v. First National Bank of St. Paul*, 273 U.S. 561, 47 S.Ct. 468, 71 L.ed. 774 (1927).

Other courts have held savings and loan associations competitive with national banks for purposes of R.S. 5219. See *Boise City Nat'l Bank v. Ada County*, 48 F.2d 222, 37 F.2d 947 (S.D. Idaho 1931, 1930) and *Na-*

tional Bank of Commerce v. King County, 153 Wash. 351, 280 Pac. 16 (1929).

Appellant's brief quotes *Hartford* effectively to establish that it is not necessary, in order to invalidate a discriminatory tax, that there be a hostile or unfriendly discrimination against national banks. In *Commonwealth v. Mellon National Bank and Trust Company,* 374 Pa. 519, 525, 98 A. 2d 38 (1953), the Pennsylvania court says:

> "The defendant on its part points to the case of *First National Bank of Hartford, Wisconsin v. City of Hartford,* 273 U. S. 548, where Mr. Justice Stone, speaking for the Supreme Court, appears to have put at rest any idea that to be violative of Section 5219 of the Revised Statutes the discrimination must be hostile or unfriendly, when he said (pp. 560-561),—'Finally it is said that § 5219 is directed to an unfriendly discrimination or hostile attitude on the part of a state and that here the Wisconsin legislation was not dictated by such considerations, since the challenged exemptions were merely incidental to the adoption of a state policy of substituting, so far as possible, an income for a personal property tax. But a consideration of the entire course of judicial decision on this subject can leave no doubt that state legislation and taxing measures which by their necessary operation and effect discriminate against capital invested in national bank shares in the manner described are intended to be forbidden.' In short, whether or not a State tax on the shares of a National bank offends against Section 5219 of the Revised Statutes does

not depend upon a hostile or unfriendly intent on the part of the taxing authority. . . ."

However, if we assume, arguendo, the survival of a vestige of the "hostility" doctrine in cases where exemptions or partial exemptions are involved, we suggest that failure of the states to recognize in their tax structure the tremendous growth and powerful position of savings and loan associations would qualify as a hostile discrimination.

To hold at this time that these large, powerful and aggressively competitive savings institutions are, as a matter of law, not competitive with national banks is to ignore economic facts. Conversely, recognition of economic facts compels recognition of the existence of competition.

II.

Artificial Rules of Law Holding Specific Types of Competing Capital to Be Legally Non-Competitive Regardless of Facts Would Create Reservoirs of Untaxed or Too Lightly Taxed Capital. This Would Discriminate Not Only Against National Banks, But Also Against the Public Generally By Cutting Down Sources of Revenue for the States at a Time When States Are Hard Put to Find Sources of Revenue.

National banks, when they invoke R.S. 5219, are not seeking to avoid taxation. They are seeking to enforce a Congressional mandate for equivalence in taxation of national bank shares.

R.S. 5219 gives Federal consent to the taxation of national banks in several ways, one of which is a tax on

shares. The consent given by R.S. 5219 to taxation of national banks is subject to the proviso that national bank shares may not be taxed at a higher rate than that imposed on other moneyed capital, etc. Observance by the states of R.S. 5219 or application thereof by this Court has the reciprocal effect of causing other moneyed capital to bear a tax burden equivalent to that of national banks.

The actual imposition of the equivalent tax is, of course, by the legislature. This Court cannot influence the imposition of equivalent taxation of other moneyed capital except indirectly by striking down a state tax on shares of national banks at a rate exceeding that imposed on competitive moneyed capital.

Hepburn v. School Directors, 23 Wall (90 U.S.) 480, 23 L.ed. 112 (1875), said in effect that Congress did not intend to exempt bank shares from taxation because some moneyed capital was exempt. But *Hepburn* does not validate an unjustified discriminatory exemption which imposes on national banks and other members of the general public the burden of making up the deficiency.

In determining for purposes of R.S. 5219 whether there is a "just reason" for exemption or partial exemption from taxation of competitive moneyed capital, there should be considered not only the effect of the discrimination on national banks but also the effect of the partial or total exemption as an escape from responsibility for a just share in the cost of state government.

III.

The Parallel Development of Powers of National Banks and of Other Financial Institutions Demonstrates Legislative Recognition of Competition Between Such Financial Institutions and Tends to Prove a Legislative Attempt to Preserve Comparative Equality of Competitive Opportunity Among Such Institutions in Fields in Which They Are Competitive.

Appellant's brief (pp. 18-20; 67-70) discusses the evolution of the power of national banks to make mortgage loans and accept savings deposits and a similar evolution of the lending powers of savings and loan associations and their power to receive savings capital. The discussion from that brief is submitted as an integral part of our argument under the above heading.

That discussion, however, can be profitably supplemented by additional reference to the parallel development of corporate powers of competing financial institutions.

A reference to 12 U.S.C. 1464 (48 Stat. 132; 48 Stat. 645, 646; 49 Stat. 297; 53 Stat. 1402; 61 Stat. 786; 62 Stat. 1239; 65 Stat. 490; 66 Stat. 604; 68 Stat. 622; 69 Stat. 640, 641; 70 Stat. 1114) and particularly to the Historical Note following 12 U.S.C.A. 1464 indicates the step by step enlargement of the powers of federal savings and loan associations. They may now, without regard to area restrictions, lend money on improved real estate insured under the provisions of the National Housing Act, as amended, or insured as provided in the Servicemen's Readjustment Act of 1944, as amended. They may lend not in excess of 15% of their assets in

unsecured loans insured or guaranteed under the Servicemen's Readjustment Act. They may invest in conventional mortgages for longer terms and in an increasing percentage of appraised value. They may invest in obligations of Federal National Mortgage Associations. They may lend not exceeding 20% of their assets on improved real estate without regard to the $35,000 limitation or the 50 mile limit. They may invest in obligations of the United States; they may invest amounts less than 5% of their withdrawable accounts in loans to finance acquisition and development of land. They may have branches (*North Arlington National Bank v. Kearny Federal Savings and Loan Association,* 187 F. 2d 564 (C.A. 3 1951) (cert. den. 342 U.S. 816, 72 S. Ct. 30, 96 L.ed. 617) (1951)).

With respect to national banks, an examination of 12 U.S.C. 24 (R.S. 5136) and particularly the notes to 12 U.S.C. 24 and a reference to 12 U.S.C. 371 (38 Stat. 273; 39 Stat. 754; 44 Stat. 1232; 48 Stat. 1263; 49 Stat. 706, 717; 55 Stat. 62; 60 Stat. 1072; 62 Stat. 265; 63 Stat. 906; 64 Stat. 80; 65 Stat. 303, 312; 67 Stat. 614; 68 Stat. 525; 68 Stat. 736; 69 Stat. 633, 634; 72 Stat. 396; 73 Stat. 489) and particularly the notes to 12 U.S.C.A. 371 indicates the growth of power to buy investment securities, to receive savings deposits, to invest in government obligations, to invest in obligations of Federal National Mortgage Association; to invest in mortgages in increasing percentages of appraised value, to invest in mortgages insured by government agencies and to engage in the safe deposit business. National banks may have branches under the same provisions as are applicable to state banks. R.S. § 5155, as amended, 12 U.S.C. 36.

In addition, the Federal Reserve System accommodates mutual savings banks as well as commercial banks. Act of Dec. 23, 1913 c.6 §9 as added June 16, 1933 c.89 §5, 48 Stat. 164, as amended, 12 U.S.C. 333. Mutual savings banks and both state chartered and federal savings and loan associations are eligible for membership in the Federal Home Loan Bank. Act of July 22, 1932 c.522 §4, 47 Stat. 726, as amended, 12 U.S.C. 1424. They are also entitled to use the reserve credit facilities of that system.

Mutual savings banks are entitled, along with commercial banks, to the advantages of insurance under the Federal Deposit Insurance Corporation. Act of Dec. 23, 1913, c.6 §12B, as added, June 16, 1933, c.89 §8, 48 Stat. 168, as amended, 12 U.S.C. 264 (f)(1); Act of Sept. 21, 1950 c.967 §2 [4], 64 Stat. 873, 12 U.S.C 1814. Analogous insurance is provided for savings and loan associations by the Federal Savings and Loan Insurance Corporation. Act of June 27, 1934 c.847 Title IV §403, 48 Stat. 1257, as amended, 12 U.S.C. 1726.

The atmosphere of competition by and among commercial banks (including national banks) mutual savings banks and savings and loan associations was clearly recognized in 1951 when Congress agreed that mutual savings banks and savings and loan associations should become subject to Federal income taxation. In Senate Report No. 781 by the Senate Committee on Finance to accompany H.R. 4473, 82nd Congress, 1st Session (now Revenue Act of 1951, 65 Stat. 452), it is stated as follows: (Volume 2, Cumulative Bulletin, Internal Revenue Service, Page 476:)

> "At the present time, mutual savings banks are in active competition with commercial banks and

life insurance companies for the public savings, and they compete with many types of taxable institutions in the security and real estate markets. As a result your committee believes that the continuance of the tax-free treatment now accorded mutual savings banks would be discriminatory. So long as they are exempt from income tax, mutual savings banks enjoy the advantage of being able to finance their growth out of earnings without incurring the tax liabilities paid by ordinary corporations when they undertake to expand through the use of their own reserves. The tax treatment provided by your committee would place mutual savings banks on a parity with their competitors."

and later at page 478:

"The grounds on which your committee's bill taxes savings and loan associations on their retained earnings, after making a reasonable allowance for additions to reserves for bad debts, are the same as those on which mutual savings banks are taxed under the bill. Moreover, since savings and loan associations are no longer self-contained cooperative institutions as they were when originally organized there is relatively little difference between their operations and those of other financial institutions which accept deposits and make real estate loans."

The case of *Franklin National Bank v. New York*, 347 U.S. 373, 74 S.Ct. 550, 98 L.ed. 767 (1954) also contains interesting observations on the development of mutual savings banks and national banks in an atmosphere of competition. The case held that New York

may not lawfully prohibit national banks from using "saving" or "savings" in their advertising or business.

Mr. Justice Jackson's opinion, announced by Mr. Justice Frankfurter, said, among other things:

> "It is the policy of New York to charter and foster the mutual savings bank, a nonprofit institution whose earnings inure to the benefit of depositors rather than to stockholders. These institutions have a long history as relatively stable and safe depositaries for the accumulations of thrifty New Yorkers and as a source of credit for limited uses. They have grown to be an important part of New York's banking and economic structure. That State also charters the savings and loan association, an institution of a different type, intended to serve somewhat similar ends. The Legislature was concerned lest commercial banks, in seeking to induce deposits of the same character, so use the word 'savings' as to lead uninformed and indiscriminating persons to believe that they were dealing with the chartered savings institutions. Hence, by its Banking Law, New York has forbidden use of the word 'savings' or its variants, by any banks other than its own chartered savings banks and savings and loan associations.
>
> "However, the Federal Government is a rival chartering authority for banks. * * * That these federal institutions may be at no disadvantage in competition with state-created institutions, the Federal Government has frequently expanded their functions and authority. Of such nature are the measures now before us. (374-375).

"The Federal Reserve Act provides that a national bank 'may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same * * *.' (375).

"Nor can we construe the two Federal Acts as permitting only a passive acceptance of deposits thrust upon them. Modern competition for business finds advertising one of the most usual and useful of weapons. We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business." (377).

The New York Legislature in adopting the legislation which was invalidated by this Court was obviously making an effort to improve the competitive position of mutual savings banks vis-a-vis national banks. This Court recognized the effort for what it was and held, on the ground that national banks derived their powers from the federal government, that the state limitation was invalid. The only conclusion that can be drawn from this case and from the legislative history of the development of powers of the several types of financial institutions is that they are recognized by the legislatures as being in competition with one another.

The doctrine embraced by the appellees and the court below that savings and loan associations are legally noncompetitive although factually competitive is naive sophistry denied by years of legislative evolution.

CONCLUSION

While the Pennsylvania Banks and the Pennsylvania tax imposed on shares of national banks are not directly involved in the above-entitled case, the Pennsylvania Banks respectfully submit that the judgment of the Supreme Court of Michigan was in error and should be reversed.

Respectfully submitted,

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